APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 25, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-9328
Non-Argument Calendar

D.C. Docket No. 1:96-CV-844-WBH

ADLISA JOHNSON,

Plaintiff-Appellant,

versus

DEPARTMENT OF TREASURY, AGENCY;
ROBERT E. RUBIN, Secretary of Treasury,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(November 25, 1998)

Before ANDERSON and MARCUS, Circuit Judges, and FAY, Senior Circuit Judge

PER CURIAM:

This appeal is from the granting of a summary judgment in favor of the defendant/appellee in a discrimination and

retaliation action brought under Title VII. Both the facts and the law support the conclusions reached by the district court that this action was filed untimely and that there is simply nothing to justify a tolling of the statute of limitations. We affirm the judgment of the district court for the reasons set forth in its ORDER of November 28, 1997.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND FILED NOVEMBER 28, 1997 AND ENTERED DECEMBER 2, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE

NO. 1:96-CV-0844-WBH

ADLISA JOHNSON,

Plaintiff

v.

ROBERT E. RUBIN,

Defendant

ORDER

Plaintiff Adlisa Johnson claims defendant Robert E Rubin, Secretary of the Department of Treasury ("Secretary"), unlawfully discriminated against her because of her race and retaliated against her for her filing a discrimination complaint, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981. Before the Court are defendant's Third Motion for Summary Judgment [24] and the magistrate judge's Report and Recommendation thereon. Also before the Court are plaintiff's Motion to Withdraw Counsel [32],

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Request for Extension of Time in Which to File Objections to Report and Recommendation [31], and what plaintiff incorrectly entitles the First Amendment to the Complaint [35], which, as explained below, the Court will treat as a motion to amend.

II. BACKGROUND[1]

Johnson was employed by the Department of the Treasury ("IRS") as a Supervisory Tax Examining Assistant. In January 1994, Johnson filed a formal complaint with the IRS, alleging that because of unlawful racial discrimination she received a rating of minimally successful on a performance evaluation. Johnson also alleged that her employer unlawfully retaliated against her for filing the complaint. On August 19, 1995, Johnson received a letter from the Department of the Treasury reporting the agency's finding that no discrimination and no retaliation existed in her case. The letter stated that this decision constituted the final agency decision ("FAD"), and informed Johnson that she had the right to (1) appeal the decision to the Equal Employment Opportunity Commission ("EEOC") within 30 days of receipt of the letter and, or (2) file a civil action within ninety days of receipt of the letter. The letter also stated that failure to appeal within 30 calendar days would result in the EEOC's dismissal of the claim.

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1. Unless otherwise indicated, the Court draws the undisputed facts from defendant's "Statement of Undisputed Material Facts," which, under Local Rule the Court must deem as admitted if uncontroverted by plaintiff. *See* Local Rule 56.1(B)(2) (N.D. Ga. 1997).

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Johnson decided to appeal the decision to the EEOC. Her appeal was postmarked September 30, 1995, thirty-two days after plaintiff received the FAD letter. On March 7, 1996, the EEOC dismissed Johnson's appeal as untimely. The EEOC's dismissal of appeal letter stated that Johnson had the right to (1) petition the EEOC to reconsider its dismissal of appeal or (2) file a civil action within ninety days of receipt of the dismissal letter. After receiving the letter, Johnson filed for reconsideration on April 6, 1996, and also filed this action on April 10, 1996. Filing of the instant action terminated the EEOC's process of the petition for reconsideration.

Motion to Withdraw Counsel and Request for Extension of Time to File Objections

Pursuant to Rule 83.1(E), M.P. Schlidmeyer, Johnson's attorney in this matter, seeks to withdraw from this action at Johnson's request. The Court grants the Motion to Withdraw and orders plaintiff to advise the Court as to the name and address of newly retained counsel or, alternatively, as to whether she will be proceeding *pro se*. In the process of filing for withdrawal, Johnson's attorney moved for a time extension in which to file objections to the magistrate judge's Report and Recommendation. Because plaintiff has *pro se* filed objections to the Report and Recommendation within the time specified by Local Rule, plaintiff's Request for Extension of Time to File Objections is denied as moot.

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Motion to Amend Complaint

Plaintiff seeks to amend her complaint under a provision of Federal Rule of Civil Procedure 15(a) that allows a party to amend its complaint once as a matter of course before responsive pleadings are served. *See* Fed. R. Civ. P. 15(a). Plaintiff believes that her amendment falls within this provision; however, she is incorrect for two reasons. First, defendant has already served its responsive pleadings and, second, plaintiff has previously amended her complaint as a matter of course. Under these circumstances, plaintiff may amend her complaint only upon leave of the court or with the written consent of the adverse party. *See* Fed. R. Civ. P. 15(a). Because plaintiff is proceeding *pro se* at this time, the Court will treat this wrongly titled filing as a motion to amend. However, upon reviewing the proposed amendments, it appears to the Court that plaintiff is confusing this case with related case, 1:96cv3344, that plaintiff also filed against this same defendant. Accordingly, the Court denies plaintiff's request for leave to amend her complaint in this action.

Motion for Summary Judgment

If no objections are filed to the magistrate judge's Report and Recommendation, it is reviewed for plain error only. *United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984). If objections are filed, the Court must conduct a *de novo* review. *Nettles v. Wainwright*, 677 F.2d 404, 409 (Former 5th Cir. Unit B 1982). In this case plaintiff objects to the magistrate judge's recommendation that the Court grant summary judgment

in favor of defendant because Johnson failed to file this action within ninety days of the FAD letter received August 19, 1995. The Court has reviewed *de novo* the entire file and has carefully considered Johnson's objections.

Under Federal Rule of Civil Procedure 56, a court shall grant a motion for summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Where the nonmoving party bears the burden of proof at trial, the moving party must demonstrate to the Court that "there is an absence of evidence to support the nonmoving party's case," *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), or must put forth affirmative evidence negating an element of the nonmoving party's case, *Fitzpatrick v. Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993). It is then the responsibility of the nonmoving party, by revealing evidence outside of the pleadings, to show that evidence supporting its case does exist or that the element sought to be negated remains a genuine issue of material fact to be tried. *Id.* Essentially, this requires the nonmoving party to come forward with evidence sufficient to withstand a directed verdict on this issue at trial. *Id.* at 1116-17.

The nonmoving party is not required to carry its burden of proof at the summary judgment stage. In analyzing the motion, the Court views the facts in the light most favorable to the nonmoving party and makes all factual inferences in favor of that party. *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 918 (11th Cir. 1993). "The court must avoid weighing conflicting evidence or making credibility determinations." *Id.* at 919. "Where a reasonable fact finder

may draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." *Id.* (quoting *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989)).

Defendant argues that he is entitled to summary judgment as a matter of law because plaintiff's complaint is time barred in that she failed to initiate this civil action within ninety days of her receipt of the FAD letter. An employee of the federal government is statutorily required to bring a civil claim of employment discrimination within "90 days of receipt of notice of final action taken by a department, agency, or unit . . . or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency or unit." 42 U.S.C. § 2000-16(c) (1994). When an employee sues her federal employer the progression of the suit requires that she first seek relief within the agency that allegedly discriminated against her. *Brown v. General Services Administration*, 425 U.S. 820, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976). If not satisfied with the agency's final decision, the employee may then either pursue her claim by filing an appeal to the EEOC or by directly filing suit in district court. *Id.*; 42 U.S.C. § 2000e-16(c). If an appeal is taken to the EEOC, the employee does not lose the right to bring suit; she may file suit in district court within 90 days of the EEOC's final decision. *Id.* Here, Johnson believes she has followed this scheme. She first complained to the agency which employed her, the Department of the Treasury. After receiving the agency final decision on August 19, 1995 she then appealed to the EEOC, and upon receiving what she believed to be

the EEOC's final decision, brought suit. The Secretary contends that because Johnson never perfected her appeal, she lost the ability to bring suit ninety days after the EEOC dismissal. This argument turns on the contention that dismissal due to untimeliness does not operate as a final decision of the EEOC because the merits of the appeal were never properly before it. Johnson counters with two arguments: first that EEOC final action did not occur until the EEOC terminated her reconsideration request and, second, that equitable concerns require tolling under the facts of this case.

Clearly, Johnson's first argument is without merit. Filing for reconsideration by the EEOC regardless of the outcome, does not affect the time for filing a civil complaint. *See Paetz v. United States*, 795 F.2d 1533, 1536 (11th Cir. 1986); *see also Martinez v. Orr*, 738 F.2d 1107, 1109 (10th Cir. 1984); *Mahroom v. Defense Language Institute*, 732 F.2d 1439, 1440 (9th Cir. 1984); *Birch v. Lehman*, 677 F.2d 1006, 1007-08 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 103 S. Ct. 725, 74 L. Ed. 2d 951 (1983). Johnson's second argument, however, requires greater consideration. The statute of limitations imposed by 42 U.S.C. § 2000e-16(c) for filing civil actions is subject to equitable tolling. *See Milam v. United States Postal Service*, 674 F.2d 860, 862 (11th Cir. 1982). Tolling is appropriate in cases in which (1) a state court action is pending; (2) the defendant conceals an act supporting the Title VII cause of action; or (3) the employee justifiably relies on misinformation regarding the nature of her rights under Title VII. *Sims v. Trus Joist MacMillan*, 22 F.3d 1059, 1061 (11th Cir. 1994) (concluding that plaintiff justifiably relied upon EEOC right

to sue letter where the EEOC informed plaintiff that it would not be able to process his claim within the statutorily required time); *Washington v. Ball*, 890 F.2d 413, 414 (11th Cir. 1989) (setting out three prong test). Johnson argues here that the EEOC letter dismissing her appeal mislead her about her rights to file civil suit. The dismissal letter contained a right to sue notice, stating that "[i]t is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision."

In *Moorer v. Brady*, 1993 WL 304464 (6th Cir. Mich), the Sixth Circuit found that a similar right to sue notice equitably tolled the operative statute of limitation. There, like here, the EEOC dismissed the plaintiff's appeal against the IRS as untimely. *Id.* The EEOC dismissal letter in *Moorer* stated that plaintiff had thirty days in which to appeal. Relying on this information, plaintiff filed suit and defendant moved for dismissal on grounds that the action was time barred. The court held that the statute of limitations was tolled, and thus allowed the suit to proceed. *Id.* While the *Moorer* case looks, at first blush, directly on point, it is distinguishable from the instant case. In *Moorer* the plaintiff received his EEOC dismissal letter while he still had fourteen days in which to file suit under the ninety day post final agency decision window. The critical difference between this case and *Moorer* is that there the plaintiff still had time in which to file a civil action under the agency decision. If the plaintiff in *Moorer* received an EEOC dismissal letter not containing a right to sue notice, he still would have been able to file suit, as long as he did so within

the fourteen days remaining in the final agency decision window. Because plaintiff relied upon the notice contained in the EEOC dismissal letter he missed the filing date by sixteen days. Here, however, Johnson lacked an independent right to sue — the window allowing suit ninety days after the agency's final decision had expired long before she received the EEOC dismissal letter. In *Moore*, the EEOC dismissal letter did not create a right, it simply confused Moore as the extent of his existing right. By contrast, Johnson's right to file suit had already expired when she received the EEOC dismissal letter, and, however erroneous the letter may have been, it caused her no prejudice. Of course, if plaintiff had timely appealed the agency decision to the EEOC, then, upon the EEOC's final decision with regard to the appeal, plaintiff would have had ninety days in which to file her civil suit.

Plaintiff had earlier argued that the Court should in this case equitably toll the thirty day time requirement for her appeal to the EEOC.[2] If the Court did so, the appeal would properly be before the EEOC, and after its decision on the merits, Johnson would have ninety days in which to file suit. According to plaintiff's attorney, plaintiff's EEOC appeal was untimely filed because the attorney was working under the incorrect assumption that the stated time for appeal allowed an additional three days for mailing. The Court rejects any contention that the time frame in which to file the EEOC appeal should be tolled. First, plaintiff was represented by counsel, who should have known the

2. Because it was not relevant to the discussion then at hand, the Court refused to address this argument in its Order regarding defendant's first motion to dismiss.

applicable law regarding filing of EEOC appeals. Thus, plaintiff's attorney's misconception is at most excusable neglect, which is not a basis for tolling a statute of limitations. *Cf. Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 458, 112 L. Ed. 2d 435 (1990). Second, and more importantly, the EEOC's dismissal was neither unconstitutional, arbitrary, or capricious and where, as is the case with the EEOC, Congress grants broad authority to an administrative agency, a court should hesitate before stepping in and judicially reviewing routine agency decisions. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

III. CONCLUSION

For the reasons stated above, the Court GRANTS the plaintiff's Motion to Withdraw [32] and ORDERS plaintiff to advise the Court as to the name and address of newly retained counsel, or, alternatively, as to whether she will be proceeding *pro se*. The Court DENIED AS MOOT plaintiff's Motion for Extension of Time to File Objections [31] and DENIES plaintiff's First Amendment to the Complaint [36]. The Court GRANTS the defendant's Third Motion for Summary Judgment [24].

It is so ORDERED this 28 day of November, 1997

s/ Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge, United States District Court

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 24, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-9328

ADLISA JOHNSON,

Plaintiff-Appellant,

versus

DEPARTMENT OF TREASURY, AGENCY;
ROBERT E. RUBIN, Secretary of Treasury,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

BEFORE: ANDERSON and MARCUS, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Adlisa Johnson, is denied.

ENTERED FOR THE COURT:

s/ [illegible]
SENIOR UNITED STATES CIRCUIT JUDGE